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4-8-08

No. 06-7617

IN THE

Supreme Court of the United States

RICHARD IRIZARRY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As the United States recognizes, the sound administration of federal criminal sentencing warrants a requirement that district courts provide parties with reasonable notice before *sua sponte* imposing a non-guideline sentence on previously undisclosed grounds. The government agrees that the text of Rule 32(h) and Rule 32(i)(1)(C) of the Federal Rule of Criminal Procedure, as well as the purposes of the rule, support the conclusion that reasonable notice is required here. Further, as this Court concluded in *Burns v. United States*, 501 U.S. 129 (1991), the due process guarantee at the center of the adversarial process supports a notice requirement.

Burns recognized that when a district court imposes a non-guideline sentence on a ground not previously identified, it risks predicating its sentence on inaccurate assumptions about the relevant facts and sentencing considerations. That is what happened in this case, where Mr. Irizarry received an above-guideline term of imprisonment based in significant part on untested and questionable assumptions about his mental condition. His sentence should be vacated and the case remanded.

I. THE DISTRICT COURT ERRED IN FAILING TO PROVIDE NOTICE OF THE CONTEMPLATED GROUNDS FOR IMPOSING A SENTENCE OUTSIDE THE GUIDELINE RANGE

Rule 32(h) and Rule 32(i)(1)(C) provide independent textual bases for the requirement that district courts provide notice before imposing any non-guideline sentence. Reasonable notice would advance the purposes of Rule 32 by ensuring full and fair adversarial testing of the contemplated grounds for the sentence. Avoiding a serious due process question is an additional reason to construe Rule 32 to require reasonable notice.

The arguments of amicus curiae defending the judgment below are unpersuasive. A requirement of reasonable notice would neither impose administrative burdens on district courts nor deter them from entering sentences at variance with the guideline range. Amicus's contention that sentences based on the Section 3553(a) factors are pure exercises in judgment, divorced from questions of fact, does not withstand scrutiny. And the advisory committee's decision to postpone consideration of an amendment to Rule 32(h) is irrelevant.

A. The Notice Requirement Of Rule 32 Applies To All Non-Guideline Sentences

1. Amicus contends (Amicus Br. 19-20) that Rule 32(h) has no application to non-guideline sentences based on the Section 3553(a) factors because the text of the rule uses the words "depart"

and "departure." Even before *United States v. Booker*, 543 U.S. 220 (2005), however, the Guidelines generally defined "departure" as the "imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence." U.S.S.G. § 1B1.1, cmt. n.1(E); *see also* U.S.S.G. ch. 1, pt. A4(b) (1991). Because a variance based on the Section 3553(a) factors qualifies as "a sentence outside the applicable guideline range," it comfortably fits within that definition of "departure." *Accord* Webster's Third New International Dictionary of the English Language 604 (1993) (defining "departure" as a "deviation or divergence esp. from a rule, course of action, plan, or purpose").

Nevertheless, according to amicus, the term "departure" has "a precise legal meaning" that refers exclusively to non-guideline sentences based on § 4A1.3 and parts H and K of chapter 5 of the Sentencing Guidelines. Amicus Br. 19-20 (quoting *United States v. Vega-Santiago*, No. 06-1558, 2008 WL 451813, at *1 (1st Cir. Feb. 21, 2008) (en banc)). Neither amicus nor the *Vega-Santiago* court, however, has identified any authority that ascribes that "precise legal meaning" to the term. *See* Amicus Br. 21; *Vega-Santiago*, 2008 WL 451813, at *1. To the contrary, this Court and nearly every court of appeals—including the court below—have used the word "departure" to describe non-guideline sentences based on the Section 3553(a) factors. *See, e.g., Rita v. United States*, 127 S. Ct. 2456, 2464 (2007) ("The sentencing courts, applying the Guidelines in individual

cases may *depart* (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence).") (emphasis added); *Gall v. United States*, 128 S. Ct. 586, 594, 595 (2007); *United States v. Martin*, 455 F.3d 1227, 1236 (11th Cir. 2006) ("[W]e review any *Booker*-based *departures* outside that range for reasonableness in light of the § 3553(a) factors and the reasons stated by the district court for *departing*.") (emphasis added).[1]

2. Amicus maintains that Rule 32(i)(1)(C) has no application here because the parties now have a "settled . . . expectation[]" that a district court may impose a non-guideline sentence "[e]ven in a completely typical case." Amicus Br. 27. In *Burns*, the Court held that a notice requirement is implicit in the provision now codified as Rule 32(i)(1)(C), which guarantees both parties an opportunity "to comment on the probation officer's

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[1] *See, e.g., United States v. Calzada-Maravillas*, 443 F.3d 1301, 1304 (10th Cir. 2006) (distinguishing between "guideline departure[s]" and "non-guideline departure[s]"); *United States v. McBride*, 434 F.3d 470, 476 n.5 (6th Cir. 2006) ("It is perhaps helpful to think of Chapter 5 departures . . . as Guideline departures. In turn, sentences lower than the Guidelines recommendation based on section 3553(a) factors can be thought of as Non-Guideline departures . . . ."); *United States v. Lane*, 509 F.3d 771, 775-76 (6th Cir. 2007); *United States v. Santiago*, 495 F.3d 820, 825 (7th Cir. 2007); *United States v. Walters*, 490 F.3d 371, 372, 374 (5th Cir. 2007); *United States v. Smith*, 472 F.3d 222, 224-25 (4th Cir. 2006); *United States v. Hawk Wing*, 433 F.3d 622, 625 (8th Cir. 2006).

determinations and other matters relating to an appropriate sentence." *See Burns*, 501 U.S. at 132. If anything, *Booker* makes it even *more* difficult to "guess when or on what grounds" a district court might sentence outside the guideline range, reinforcing the need for reasonable notice to allow the parties "to 'comment' on such a possibility in a coherent way." *Burns*, 501 U.S. at 136-37. Because the broad factors described in Section 3553(a), like the Guidelines, "place essentially no limit on the number of potential factors that may warrant" a non-guideline sentence, *id.* at 136, the reasoning of *Burns* applies with equal, if not greater, force to non-guideline sentences based on Section 3553(a). *See Rita*, 127 S. Ct. at 2465 (citing Rule 32(h), Rule 32(i)(1)(C), and *Burns* for the proposition that "the sentencing court subjects the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure," even for sentences reviewed for reasonableness on appeal after *Booker*).

3. Amicus also contends (Amicus Br. 47-53) that a district court's decision to impose an above-guideline sentence without prior notice to the defendant presents no serious due process question. That contention underestimates the strength of the due process interests at stake.

Although the Court in *Burns* did not elaborate on the constitutional question it sought to avoid, 501 U.S. at 138, the parties and the dissent approached the issue using the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See id.* at 147 (Souter, J., dissenting). Under that framework, there remains a serious constitutional

question whether a district court may *sua sponte* impose an above-guideline sentence without notice to a criminal defendant. As this Court recognized in *Townsend v. Burke*, 334 U.S. 736, 741 (1948), due process protects a defendant's liberty interest in the length of a sentence and prohibits sentences that are predicated on "misinformation." A district court's *sua sponte* deviation from the guideline range poses a serious risk of deprivation by leaving "critical sentencing determination[s]" relevant to that decision "untested." *Burns*, 501 U.S. at 137. Reasonable notice of the contemplated grounds, by contrast, safeguards the defendant's interest because it affords the defendant a full and fair opportunity to challenge the factual and legal basis for the court's action. *Id.* The government's interest does not outweigh those considerations. As the United States vigorously argues, the prosecution has a corresponding interest in reasonable notice and accuracy, and any burden on the courts is minimal. Gov't Br. 26-28, 32-34; *see infra* 8-11.

Amicus suggests (Amicus Br. 50-51) that *Booker* has undercut a defendant's due process interest in a guideline sentence. It is true that, in the wake of *Booker*, a defendant no longer has an entitlement to a guideline sentence "in the absence of grounds defined by the Act as justifying departure." *Burns*, 501 U.S. at 147 (Souter, J., dissenting). Yet the Guidelines continue to serve as "the starting point and the initial benchmark" for every sentence, and the court must offer a sufficient justification for a decision to sentence outside the guideline range. *Gall*, 128 S. Ct. at 596-

97. The Court in *Rita* emphasized the continuing "importance of notice and meaningful opportunity to be heard at sentencing" after *Booker*. 127 S. Ct. at 2465. Thus, as in *Burns*, the avoidance of a serious constitutional question provides an additional reason to construe Rule 32 to provide reasonable notice.[2]

Amicus also argues that *Medina v. California*, 505 U.S. 437, 446 (1992), rather than *Mathews*, governs the due process inquiry. Neither the context nor the logic of *Medina*, however, extends to these circumstances. In *Medina*, the Court declined to apply *Mathews* to state-court trial proceedings because "[t]he Bill of Rights speaks in explicit terms to many aspects of criminal procedure," and the Due Process Clause does not "'establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure.'" 505 U.S. at 443 (quoting *Spencer v. Texas*, 385 U.S. 554, 564 (1967)). The Bill of Rights is

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[2] Amicus also contends that the canon of constitutional doubt has no application here because Rule 32 is unambiguous. Amicus Br. 47 (citing *Miller v. French*, 530 U.S. 327, 341 (2000)). That argument is foreclosed by *Burns*, which found a sufficient textual basis for a notice requirement in Rule 32(i)(1)(C) and applied the avoidance canon so as not to "confront the serious question whether notice in this setting is mandated by the Due Process Clause." 501 U.S. at 138 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). Since that decision, Rule 32 has gained a second textual hook: the express requirement of reasonable notice for "departures" in Rule 32(h).

silent, however, on post-trial proceedings like criminal sentencing. In the absence of such "explicit [constitutional] terms," the background due process analysis of *Mathews* remains applicable. *See id.* at 454-55 (O'Connor, J., concurring) (deeming the *Mathews* test appropriate "in the context of modern administrative procedures," including "the new administrative regime established by the federal criminal sentencing guidelines"); *Burns*, 501 U.S. at 147 (Souter, J., dissenting). Further, because *Medina* rested on state legislatures' "considerable expertise in matters of criminal procedure," 505 U.S. at 445-46, it has never been extended to federal-court proceedings. *See United States v. Wise*, 976 F.2d 393, 412 n.4 (8th Cir. 1992) ("The Court's reasoning [in *Medina*] draws heavily on considerations of federalism, and it seems that *Mathews* is still generally applicable under the Due Process Clause of the Fifth Amendment.") (citation omitted).

B. The Remaining Arguments Of Amicus Lack Merit

Amicus advances three additional arguments to defend the decision below. None of these rationales was relied upon by the court of appeals (J.A. 399-400), and none is convincing.

1.a. Amicus mistakenly argues (Amicus Br. 28-36) that a requirement of reasonable notice would be "burdensome" for administrative reasons. In *Burns*, however, this Court recognized that it is only "the extraordinary case" in which the district court departs "on its own initiative and contrary to the expectations of both the de-

fendant and the Government." 501 U.S. at 135. After *Booker*, *sua sponte* non-guideline sentences remain rare. The Sentencing Commission's final quarterly report for fiscal year 2007 reveals that out of 51,997 sentences, only 9,493 (18.3%) fell outside the guideline range. Even fewer (6,604 sentences, or 12.7%) identified *Booker* or Section 3553(a) as a basis for sentencing outside the guideline range.[3] And in the overwhelming majority of those cases, the ground for the non-guideline sentence was specifically identified in the presentence report (PSR) or by the parties. Gov't Br. 32. It is only "the extraordinary case" in which the district court surprises the parties by sentencing outside the guideline range on previously undisclosed grounds. *Vega-Santiago*, 2008 WL 451813, at *11 (Lipez, J., dissenting) (concerns "that an advance notice rule would often require a two-stage sentencing process" are "at odds with reality").

Moreover, even under the construction adopted by the court of appeals (*see* J.A. 398-99), Rule 32 compels district court judges to determine before sentencing whether the PSR or a party's submission recommends a departure under the Guidelines. *See* Fed. R. Crim. P. 32(h). If none has been suggested, but the district court nonetheless believes a Guidelines departure may be warranted, the court is obligated to provide reasonable notice to the parties "specify[ing] any ground on which the court is contemplating a de-

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[3] *See* App., *infra*, 1a. All figures exclude government-sponsored below-range sentences. *Id.* n.*.

parture." *Id.* There is no reason to believe that the *marginal* burden of considering possible grounds for a non-guideline sentence under Section 3553(a) at the same time would prove unworkable.[4]

Amicus poses a series of rhetorical questions designed to show that a reasonable-notice requirement would be unworkable. *See* Amicus Br. 31-32 (questioning the timing of the required notice, the "amount" and specificity of notice, district courts' willingness to fully explain their decisions, and the length of a necessary continuance). But identical questions about the timing and content of "reasonable notice" arose under *Burns*. *See Burns*, 501 U.S. at 139 n.6 ("Because the question of the *timing* of the reasonable notice required by Rule 32 is not before us, we express no opinion on that issue."). Those concerns were no obstacle to the recognition of a notice requirement in that case, and they should not assume any greater importance here. In addition, courts of appeals that require reasonable notice for all non-guideline sentences already have begun to address those

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[4] For the same reason, the contention that a reasonable notice requirement will transform the Crime Victim's Rights Act (CVRA) "into a procedural nightmare" (Amicus Br. 33) cannot be credited. Victim impact testimony may identify grounds for Guidelines departures as well as reasons for *Booker* variances. Amicus offers no evidence that Rule 32 has rendered the CVRA "an empty exercise" anywhere, let alone that the effect has been more pronounced in circuits in which the notice requirement applies to variances. *See* Amicus Br. 34.

questions.[5] Amicus points to no evidence of widespread continuances, a breakdown in appellate review, or other dire consequences in those circuits.

b. Amicus argues that a notice requirement would be "problematic" under the Sixth Amendment because it "risks creating an excessive 'gravitational pull' back toward the Guidelines." Amicus Br. 29 (quoting *Rita*, 127 S. Ct. at 2487 (Souter, J., dissenting)). In amicus's view, district courts eager to avoid the "practical costs" of providing reasonable notice will impose within-guideline sentences even in cases where the Section 3553(a) factors justify an out-of-guideline sentence. *Id.* That contention begins from the faulty premise that district court judges would prefer to impose the wrong sentence rather than bear the "modest burden of preparing a brief no-

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[5] *See United States v. Tate*, 516 F.3d 459, 468 (6th Cir. 2008) (notice need only identify factors that will "play[] [a] significant role in the imposition of [the] sentence"); *United States v. Vowell*, 516 F.3d 503, 515 (6th Cir. 2008) (timing of notice "is a context-specific question" that depends on the complexity of the issues and the availability of cumulative evidence on the relevant ground); *United States v. Blatstein*, 482 F.3d 725, 732 (4th Cir. 2007) (notice must enable the parties to "subject the *rationale* for the variance to the adversarial testing process contemplated by Rule 32") (emphasis added); *United States v. Anati*, 457 F.3d 233, 238 (2d Cir. 2006) (notice must "facilitate a defendant's opportunity to contest the *factual premises* of the sentencing judge's view" of the Section 3553(a) factors) (emphasis added).

tice." *Vega-Santiago*, 2008 WL 451813, at *12 (Lipez, J., dissenting). Federal judges do not suffer from such timidity. *Id.* ("It is inconceivable to me that, having given the Guidelines due consideration and finding them lacking, a judge would suppress the independent judgment required by the Supreme Court simply to avoid providing the parties with reasonable prehearing notice.").

In any event, amicus's "gravitational pull" claim is foreclosed by *Rita*. There, the Court saw nothing "problematic" in an appellate presumption of reasonableness for guideline sentences, even on the assumption that the presumption would "encourage sentencing judges to impose Guidelines sentences." *Rita*, 127 S. Ct. at 2467. So long as a procedural rule does not effectively require that the court find facts before imposing a sentence above the otherwise applicable maximum, it does not implicate the Sixth Amendment concerns identified in *Booker*. *See id.* at 2466; *id.* at 2476 (Scalia, J., concurring); *id.* at 2488 (Souter, J., dissenting).

2. Amicus also relies on a conceptual distinction that treats "variances" as pure exercises in judgment that are divorced from questions of fact. Amicus Br. 22-23 (citing Douglas A. Berman, *Conceptualizing* Booker, 38 Ariz. St. L.J. 387 (2006)). In the view of amicus, Guidelines departures "are justified on the basis of distinct facts," whereas "variances are justified on the basis of reasoned judgments *about* facts." *Id.* at 22. Reasonable notice should be limited to Guidelines departures, amicus argues, because such notice "is justified and administratively feasible" when con-

fined to "whatever case *facts* may seem atypical," but unworkable if extended to judgments. *Id.* at 25. For several reasons, that distinction does not withstand scrutiny.

First, *Booker* variances are almost always "justified on the basis of distinct facts" as well. In *Gall*, for example, the district court entered a below-guideline sentence in light of the Section 3553(a) factors. It expressly based that judgment on facts about the case: the defendant's voluntary withdrawal from the conspiracy, his admirable post-offense conduct, the support of his family and friends, and his age at the time of the offense conduct. 128 S. Ct. at 593. Although no factual finding is *necessary* before imposing a non-guideline sentence based on the Section 3553(a) factors, *see Booker*, 543 U.S. at 259, it is undeniable that facts—not just abstract judgments—typically serve as the basis for a *Booker* variance. *Gall*, 128 S. Ct. at 597 (the "individualized assessment" required under Section 3553(a) is "based on the facts presented").[6]

Second, the distinction drawn by amicus makes no sense for the many Guidelines departure grounds that can simply be recharacterized as grounds for a non-guideline sentence under

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[6] Amicus also mischaracterizes Guidelines departures, which require not only a finding of atypical facts, but a judgment that the atypical facts in a particular case should result in a non-guideline sentence. *See Koon v. United States*, 518 U.S. 81, 98 (1996) (a Guidelines departure "embodies the traditional exercise of discretion by a sentencing court").

Section 3553(a). The same atypical case facts that justify a Guidelines departure based on the inadequacy of the defendant's criminal history (U.S.S.G. § 4A1.3) or the defendant's extreme conduct (U.S.S.G. § 5K2.8), for example, can now justify an above-guideline sentence based on "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1). The overlap between the grounds for Guidelines departures and *Booker* variances is confirmed by the significant number of cases in which the district court cites *both* the Guidelines and *Booker* or Section 3553(a) as the basis for a non-guideline sentence, or specifies *neither* as the basis for its decision.[7] When the same ground could support a non-guideline sentence on either basis, the parties' entitlement to

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[7] Amicus denies (Amicus Br. 43 n.3) that district courts sometimes characterize their non-guideline sentences as *both* a Guidelines departure and a variance, and sometimes specify *neither* basis, *see* Pet. Br. 23, and faults petitioner for relying on preliminary data. But the final quarterly report, cited in amicus's brief, shows even more such sentences than the preliminary report: 1,156 sentences (12.2% of non-guideline sentences) in which the Court specified both bases, and 808 sentences (8.7% of non-guideline sentences) in which the Commission could not determine whether the sentence was a Guidelines departure or a variance. *See* App., *infra*, 1a. The figures were even higher in 2006. *See* U.S. Sentencing Commission, *2006 Sourcebook of Federal Sentencing Statistics*, Table N, *available at* http://www.ussc.gov/ANNRPT/2006/TableN.pdf (both bases specified in 1,609 sentences (16.7%), and neither basis specified in 1,014 sentences (10.5%)).

notice should not depend on how the district court chooses to characterize its decision.

Third, amicus's distinction between facts and judgment is irrelevant to the text and purpose of Rule 32. Rule 32(h) by its terms requires reasonable notice for any "departure," which the Guidelines define as a "sentence outside the applicable guideline range." U.S.S.G. § 1B1.1, cmt. n.1(E). Even if *Booker* variances were pure exercises in judgment, they would still fall within that definition. Similarly, Rule 32(i)(1)(C) grants parties a right to comment on all "matters relating to an appropriate sentence," and judgments that might lead to a non-guideline sentence certainly qualify as matters related to an appropriate sentence. Construing either provision to require reasonable notice would advance "Rule 32's purpose of promoting focused, adversarial resolution of the legal and factual issues." *Burns*, 501 U.S. at 137. Without such notice, as in *Burns*, parties would be forced either to "address possible *sua sponte* [variances] in a random and wasteful way by trying to anticipate and negate every conceivable ground" for sentencing outside the guideline range, or to "not even try to anticipate such a development," leaving "a critical sentencing determination . . . untested by the adversarial process contemplated by Rule 32." *Id.*

3. Amicus also claims that the Court should confine Rule 32(h) to Guidelines departures because the rulemaking process "has considered and rejected the very rule Petitioner seeks." Amicus Br. 17; *see id.* at 42-46. That claim misstates the rulemaking proceedings and draws an unwar-

ranted inference from the advisory committee's inaction.

As amicus observes (Amicus Br. 45), the Advisory Committee on Criminal Rules has considered an amendment to Rule 32(h) that would expressly require reasonable notice for non-guideline sentences based on the Section 3553(a) factors. Contrary to amicus's claim that the amendment has been "rejected," the advisory committee has appropriately elected to await guidance from this Court. The proposal was recently referred to a subcommittee for further study.[8] The committee's December 2007 report explained that although "[t]he Advisory Committee agreed that the proposal had sufficient merit to warrant further consideration, it has deferred consideration *due to developments in both the Supreme Court and the lower courts*."[9] It is no small irony that amicus asks this Court to defer to the rulemaking process even as the rulemakers defer to the courts.

In a highly one-sided account of the public comments and committee debate, amicus suggests (Amicus Br. 45) that the committee's inaction resulted from "vociferous" objections from federal judges. That distorted account illustrates why "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *United States v. Craft*,

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[8] Report of the Advisory Committee on Criminal Rules, Dec. 12, 2007, at 4, *available at* http://www.uscourts.gov/rules/Reports/CR12-2007.pdf.

[9] *Id.* (emphasis added).

535 U.S. 274, 287 (2002). Not only do the minutes and public comments reveal extensive supportive statements as well,[10] but the vote before the advisory committee reflected its belief that further study was needed to determine "whether either due process or the current text of Rule 32(h) require notice to be given if the court is considering non guideline sentencing factors that have not already been identified."[11] Some committee members also "expressed the view that this was an evolving area of the law that was not yet ripe for codification."[12] Because "several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change," *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 187 (1994), the proposed amendment does not preclude this Court from properly construing Rule 32(h) and Rule 32(i)(1)(C) to impose a requirement of reasonable notice for *Booker* variances.

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[10] *See* Minutes of the Oct. 26-27, 2006 Meeting of the Advisory Committee on Criminal Rules at 4, *available at* http://www.uscourts.gov/rules/Minutes/CR-10-2006-min.pdf; 2005 Criminal Rules Comments Chart, http://www.uscourts.gov/rules/CR%20Rules%202005.htm.

[11] Report of the Advisory Committee on Criminal Rules, Dec. 18, 2006, at 2, *available at* http://www.uscourts.gov/rules/Reports/CR12-2006.pdf.

[12] *Id.*

II. THE DISTRICT COURT'S ERROR WARRANTS REMAND FOR A NEW SENTENCING HEARING

The government agrees that the district court erred in failing to provide reasonable notice of the contemplated grounds for its non-guideline sentence. It nonetheless asks this Court (Gov't Br. 37-48) to review the record and determine that the error was harmless. Consistent with its ordinary practice, the Court should remand to allow the court of appeals to consider that question in the first instance. If, however, the Court elects to conduct an independent review to reach the harmless-error question, it should find prejudice and remand the case for a new sentencing hearing.

A. This Court Should Remand To The Court Of Appeals

1. The government invites this Court (Gov't Br. 38-39) to conduct a plenary review of the record and determine in the first instance whether the notice error was prejudicial. Nothing about this case justifies that unusual action. The case instead should be remanded to the court of appeals.

This Court has repeatedly explained that its "normal practice where the court below has not yet passed on the harmlessness of any error" is to "remand th[e] case to the Court of Appeals" to consider whether the error was harmless "in the first instance." *Neder v. United States*, 527 U.S. 1, 25 (1999); *see, e.g.*, *Dobbs v. Zant*, 506 U.S. 357, 359 n.* (1993) (per curiam) ("[W]e see no reason to depart here from our normal practice of allowing

courts more familiar with a case to conduct their own harmless-error analyses."); *Carella v. California*, 491 U.S. 263, 266-67 (1989); *Pope v. Illinois*, 481 U.S. 497, 504 (1987); *Rose v. Clark*, 478 U.S. 570, 584 (1986); *California v. Green*, 399 U.S. 149, 169-70 (1970).

That practice follows from the Court's ordinary presumption that it "do[es] not decide in the first instance issues not decided below." *NCAA v. Smith*, 525 U.S. 459, 470 (1999). It also reflects the courts of appeals' relatively greater experience reviewing an entire district court record and applying harmless-error analysis. *Connecticut v. Johnson*, 460 U.S. 73, 102 (1983) (Powell, J., dissenting) (even when "this Court properly could decide the question of harmless error," it is "a question more appropriately left to the courts below" because "[t]here may be facts and circumstances not apparent from the record before us").

The government relies (Gov't Br. 38) on *United States v. Hasting*, 461 U.S. 499 (1983), for the proposition that the Court "plainly ha[s] the authority" to reach the harmless-error question. *Id.* at 510. But no one doubts the Court's authority to consider harmlessness; the Court's longstanding practice is to forego the *exercise* of that authority except in unusual circumstances. As the Court in *Hasting* emphasized, in the same sentence relied upon by the government, "we are not required to review records to evaluate a harmless error claim, *and do so sparingly*." *Id.* (emphasis added).

Traditionally, the Court has conducted its own review for harmlessness only in limited circum-

stances. First, the Court has conducted an independent harmless-error analysis where the court of appeals already passed on that question. *See Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993); *Yates v. Evatt*, 500 U.S. 391, 407 (1991); *Hasting*, 461 U.S. at 503-04; *Brown v. United States*, 411 U.S. 223, 231 (1973). Second, in some cases, the Court has granted certiorari precisely to decide the applicability of harmless-error review. *See Arizona v. Fulminante*, 499 U.S. 279, 284-85 (1991); *Satterwhite v. Texas*, 486 U.S. 249, 251 (1988); *United States v. Lane*, 474 U.S. 438, 439-40 (1986); *Harrington v. California*, 395 U.S. 250, 252 (1969); *Chapman v. California*, 386 U.S. 18, 20 (1967). Third, on occasion the Court has declined to reach the merits of a claim of error and *instead* has determined that the error, if any, was harmless. *See Milton v. Wainwright*, 407 U.S. 371, 372 (1972).

None of those circumstances exists here. The court of appeals found no error, and therefore has not yet considered the government's contention that the error was harmless. *See* J.A. 398-400. This Court granted certiorari to resolve a circuit conflict over whether reasonable notice was required for non-guideline sentences based on Section 3553(a), and the government makes no claim that the proper application of harmless-error review independently warrants this Court's attention. Nor has either party urged that the Court resolve the harmless-error issue instead of resolving the question presented.

2. The government notes that "[t]he parties have fully briefed the [harmlessness] issue," and

urges that the Court's independent assessment of the record in this case "would provide vital guidance to the lower courts." Gov't Br. 38. Those factors, however, do not distinguish this case from *Burns*, where the parties had fully briefed the harmless-error question, *see* Pet. Br. 37-42, *Burns v. United States*, No. 89-7260, *available at* 1990 WL 505507 (Aug. 13, 1990), but the Court conformed to its ordinary practice by remanding the case to the court of appeals. *See Burns*, 501 U.S. at 133. If anything, the need for guidance was *greater* in *Burns* because, in that case, lower courts had never before been called upon to assess whether a failure to provide notice was prejudicial. The government offers no reason to believe that "vital guidance" is now needed to assist lower courts in continuing to apply the same form of harmless-error analysis they have applied for seventeen years.

3. The existence of a separate question concerning the governing standard of harmless-error review is an additional reason to remand the case. Two courts of appeals have held that every violation of the rule announced in *Burns* implicates due process and is therefore subject to harmless-error review under the *Chapman* standard for constitutional error. *See United States v. Lopreato*, 83 F.3d 571, 577 (2d Cir.), *cert. denied*, 519 U.S. 871 (1996); *United States v. Paslay*, 971 F.2d 667, 674 (11th Cir. 1992). Two other courts of appeals have expressly reserved the question. *See Calzada-Maravillas*, 443 F.3d at 1307 n.3 (10th Cir. 2006); *United States v. Himler*, 355 F.3d 735, 743 (3d Cir. 2004). Those decisions demonstrate,

at a minimum, that a serious question exists as to the proper standard. Review by this Court is therefore unwarranted. *Cf. Tuggle v. Netherland*, 516 U.S. 10, 14 (1995) (where the lower court "did not consider whether, or by what procedures, the sentence might be sustained or reimposed" and did not "address[] whether harmless-error analysis is applicable to this case," remand was appropriate "[b]ecause this Court customarily does not address such an issue in the first instance").[13]

B. The Government Cannot Show That The Error Was Harmless

In the event that the Court chooses to resolve the harmless-error question, it should order a new sentencing hearing because the error was prejudicial regardless of the applicable standard of re-

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[13] The government maintains that a criminal defendant must preserve a "separate due process claim" to benefit from the *Chapman* standard, relying on Confrontation Clause decisions from the Second and Tenth Circuits. Gov't Br. 40 (citing *United States v. Dukagjini*, 326 F.3d 45, 59-60 (2d Cir. 2003); *United States v. Ramirez*, 479 F.3d 1229, 1246-47 (10th Cir. 2007)). The Second Circuit, however, has expressly rejected the requirement of a separate due process claim as a precondition to *Chapman* review in this context, *see Lopreato*, 83 F.3d at 577, and the Tenth Circuit has held the question open, *see Calzada-Maravillas*, 443 F.3d at 1307 n.3. If the Court were to conclude that the government has carried its burden under *Kotteakos*, but that it has failed to show harmlessness beyond a reasonable doubt under *Chapman*, then the Court would be forced to engage in a due process analysis that it otherwise could avoid.

view. *See United States v. Hernandez*, 476 F.3d 791, 801 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 265 (2007) (declining to decide whether the error was constitutional in nature because under either standard the error was not harmless).

The district court's imposition of the statutory maximum sentence was predicated on the untested and questionable premise that Mr. Irizarry would continue to threaten his wife "regardless of what kind of supervision he's under." J.A. 374. Nothing in the PSR alerted defense counsel of the importance of the dispute over Mr. Irizarry's amenability to alternative forms of supervision, including psychiatric treatment. The record reveals substantial evidence, not brought to the attention of the court at sentencing, indicating that a guideline-range term of imprisonment followed by psychiatric treatment as a condition of supervised release would have been a sufficient sentence.

1. The standard articulated in *Kotteakos v. United States*, 328 U.S. 750, 776 (1946), "places the burden on prosecutors to explain why th[e] errors were harmless." *Brecht*, 507 U.S. at 640 (Stevens, J., concurring). The reviewing court must "evaluate the error in the context of the entire trial record." *Id.* at 641-42. If the court is left with "grave doubt" about the effect of the error, it may not treat the error as harmless. *Fry v. Pliler*, 127 S. Ct. 2321, 2328 n.3 (2007); *O'Neal v. McAninch*, 513 U.S. 432, 438-39 (1995).

The government principally contends (Gov't Br. 41-43) that the portion of the PSR discussing

a possible criminal-history departure under Sentencing Guidelines § 4A1.3 renders the notice error harmless. That contention is flawed because the PSR focused on Mr. Irizarry's criminal history, and the district court did not impose a non-guideline sentence on that basis.

The PSR calculated that Mr. Irizarry had zero criminal history points, resulting in a criminal history category of I. J.A. 410. In reaching that conclusion, however, the PSR discounted four prior adult offenses (three of them for driving with a suspended license) because they fell outside the applicable time limits, *see* U.S.S.G. § 4A1.2(e), and it discounted his prior conviction for violating the South Carolina restraining order because Mr. Irizarry was not represented by counsel, *see* U.S.S.G. § 4A1.2 Commentary Background. J.A. 408-10. The final paragraph of the PSR stated that "[p]ursuant to Guideline 4A1.3 (Adequacy of Criminal History Category), the Court may consider whether or not the defendant's criminal history category adequately reflects the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." J.A. 417. In that event, the PSR stated, a departure under § 4A1.3 might be warranted. *Id.*

Seizing upon the reference to "the likelihood that the defendant will commit other crimes," the government argues (Gov't Br. 42) that the notice error in this case was harmless because Mr. Irizarry had "every incentive" to discuss his future dangerousness at sentencing. In context, however, the PSR refers only to Mr. Irizarry's past

criminal conduct as an indicator of future dangerousness. J.A. 417; U.S.S.G. § 4A1.3(a)(2) (enumerating particular conduct that may be underrepresented in a defendant's criminal history score, justifying an upward departure). That plainly was not the basis for the district court's sentence. The district court made no finding that Mr. Irizarry's criminal history category underrepresented his dangerousness; in fact, it expressly found that criminal history category I was appropriate. J.A. 372. Neither the court nor the parties invoked § 4A1.3 during sentencing. *See* J.A. 374-75; Gov't Br. 42 n.7.

Nor did the district court in effect ground its sentence on a judgment about Mr. Irizarry's criminal history. In explaining its reasons for sentencing above the guideline range, the court relied in substantial part on the likely effectiveness of alternative forms of punishment or supervision:

> I find the guideline range is not appropriate in this case. I find Mr. Irizarry's conduct most disturbing. I am sincerely convinced that he will continue, as his ex-wife testified, in this conduct *regardless of what this court does* and *regardless of what kind of supervision he's under*. And based upon that, I find that the maximum time that he can be incapacitated is what is best for society, and therefore the guideline range, I think, is not high enough.

J.A. 374-75 (emphasis added). That passage contains two distinct rationales: first, that Mr. Iri-

zarry would continue his "disturbing" threats against his ex-wife; and second, that no alternative "kind of supervision"—such as mandatory psychiatric treatment—could stop him. *See id.* at 374. The latter rationale depends on the likely success of treatment, and bears no connection to Mr. Irizarry's criminal history.

In hindsight, the district court's focus on the efficacy of supervised treatment makes perfect sense. A district court in its discretion may require, as a condition of supervised release, that the defendant "undergo available medical, psychiatric, or psychological treatment . . . as specified by the court, and remain in a specified institution if required for that purpose." 18 U.S.C. § 3563(b)(9); *see also id.* § 3583(d). Here, that course of action had been specifically recommended. *See* Federal Medical Center ("FMC") Report 14 (recommending that Mr. Irizarry receive "medication and mental health treatment on an outpatient basis" upon his release, but adding that "this would likely have to be required for him to adequately participate in treatment," and that "[a]t times he may require brief psychiatric hospitalizations as well"); J.A. 415 (PSR provision inviting the district court to consider a sentence committing Mr. Irizarry to continuing treatment at a suitable facility under 18 U.S.C. § 4244(d)).

Yet the district court gave no indication until the moment it announced its sentence that the supposed futility of treatment might justify a sentence above the guideline range. Neither the PSR nor a prehearing submission by the government identified that potential ground for deviation from

the guideline range.[14] As a result, the parties made no argument and did not introduce expert medical testimony concerning Mr. Irizarry's treatment options. Just as the Court in *Burns* warned, "a critical sentencing determination [has] go[ne] untested by the adversarial process contemplated by Rule 32." 501 U.S. at 137. Because Mr. Irizarry's prospects for treatment played a critical role in the district court's decision to sentence above the guideline range, and the PSR referred only to criminal history, the PSR does not assist the government in its effort to show that the failure to provide notice was harmless.[15]

2. For the same reasons, the government is mistaken in its contention (Gov't Br. 43-45) that the notice error was harmless because "future dangerousness" influenced several other contested issues at sentencing, including the victim-impact

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[14] Indeed, at the competency hearing, the district court specifically cut off testimony about the relationship between Mr. Irizarry's mental condition and "concern about the potential for dangerousness" and "third-party risk." J.A. 188-89.

[15] For the same reasons, the government is mistaken in its novel suggestion (Gov't Br. 42 n.7) that "there was no notice error at all" in this case. The government did not oppose certiorari on that basis, *see* Gov't Br. in Opp. 14, and it never pressed that claim before court of appeals. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 39 (1989) (although the Court may consider any alternative ground for affirmance, "where the ground presented here has not been raised below we exercise this authority only in exceptional cases") (internal quotation marks omitted).

testimony, the denial of an adjustment for acceptance of responsibility, and the upward adjustment for intent to carry out the threats. The portions of the PSR and sentencing hearing that addressed those issues did not address the key question whether any form of supervision other than imprisonment would be effective.

The government's contention suffers from a more fundamental defect as well. A lack of reasonable notice cannot be automatically harmless so long as the "ground" for the district court's sentence—described at the level of generality used in Section 3553(a)—appears somewhere in the PSR or is mentioned at sentencing. *Compare* 18 U.S.C. § 3553(a)(2)(C) ("to protect the public from further crimes of the defendant"), *with* Gov't Br. 43-45 (error is harmless because issues at sentencing implicated "future dangerousness" and "[t]he likelihood that petitioner would commit future crimes"). That approach would render virtually all notice errors harmless and undermine the effectiveness of the rule. Under Section 3553(a)(1), for example, a district court may impose a non-guideline sentence based on "the nature and circumstances of the offense and the history and characteristics of the defendant." But *every* PSR and sentencing hearing must address those factors. Fed. R. Crim. P. 32(d)(2)(A). Reasonable notice is required to alert the parties to the *aspect* of the offense or the defendant's history that, in the court's view, might justify a non-guideline sentence. If general discussion of the relevant Section 3553(a) factor were sufficient to make any

error harmless, district courts could disregard the notice requirement with impunity.

3. Relying on the FMC report, the government asserts that Mr. Irizarry's decision to forego treatment on a voluntary basis while hospitalized proves that the failure to provide notice was harmless. *See* Gov't Br. 46-47; FMC Report 11, 14 (indicating that Mr. Irizarry had declined medication and was "not motivated to engage in any treatment"). The district court, however, unquestionably had the authority to *compel* Mr. Irizarry to undergo psychiatric treatment as a condition of supervised release. *See* 18 U.S.C. §§ 3563(b)(9), 3583(d); J.A. 376 (directing Mr. Irizarry to participate in whatever mental health treatment program the probation office deemed appropriate). Mr. Irizarry's willingness to volunteer for treatment is therefore irrelevant to the "kind of supervision" at the district court's disposal. J.A. 374.

The government also repeats its claim (Gov't Br. 45) that the error is harmless "because there is only a nine month difference" between the sentence imposed and the guideline maximum. Yet the relatively small size of the variance just as easily cuts against harmlessness by indicating that a more modest showing could have persuaded the court to stay within the guideline range. *See United States v. Cousins*, 469 F.3d 572, 580-81 (6th Cir. 2006) (concluding that "the minimal variance that [the judge] imposed—a mere two months above the top of the Guidelines range"—favors a finding of prejudice).

4. The government is correct that prejudice depends on a showing that the party "would have done things differently" with reasonable notice. *Himler*, 355 F.3d at 742. Courts of appeals have not hesitated to deem notice errors harmless where the party affected by the error fails to identify additional evidence or meaningfully different argument sufficient to cast doubt on the sentence imposed. *United States v. McClung*, 483 F.3d 273, 276-77 (4th Cir. 2007); *United States v. Gilmore*, 471 F.3d 64, 66 (2d Cir. 2006); *United States v. Meeker*, 411 F.3d 736, 744 (6th Cir. 2005).

In this case, however, the lack of reasonable notice had a substantial and injurious effect on the sentence. Although there is no evidence that Mr. Irizarry's mental condition can be "cured," *see* J.A. 269, every expert report has indicated that it is amenable to treatment. The FMC Report concluded that Mr. Irizarry's violent and threatening behavior following the end of his marriage is "linked to his maladaptive personality traits," and "paranoid delusions may have played some role as well." FMC Report 14. It also found that medication and treatment "could diminish the intensity of his paranoid ideations" while helping to address his "anxiety and depression." *Id.*; *see also* J.A. 146 (Dr. Buigas's testimony that available medications work even for more serious disorders); Bennett Report 5 (antipsychotic medications "may well improve" his "delusional thinking"). *See United States v. Fancher*, 513 F.3d 424, 431 (4th Cir. 2008) (failure to provide notice prejudicial because "had he been aware of the court's view that [the defendant] could not be re-

habilitated, counsel would have presented testimony from experts with experience in the treatment program, testimony that may have alleviated the court's concern about [the defendant's] likely success under the program and the risk of recidivism").

In addition, Dr. Bennett concluded that "[i]ncarceration is more likely to increase [Mr. Irizarry's] delusional thinking than decrease it." Bennett Report 5. The district court has never evaluated that conclusion, *see* J.A. 267-70, and, if accepted, that testimony alone would justify supervised release upon a condition of mandatory psychiatric care, rather than an extended term of imprisonment.

Because a critical and questionable rationale for the sentence went untested at the hearing, the error cannot be ignored as harmless.

CONCLUSION

The judgment of the court of appeals should be reversed and remanded for further proceedings.

Respectfully submitted,

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APPENDIX

2007 Sentencing Statistics

	Total Sentences*	Guidelines Departures	Non-Guideline *Booker*/3553(a)	Both Guidelines Departure and *Booker*/3553(a)	Neither Basis Specified	Total Non-Guideline Sentences*
D.C. Cir.	256	5	40	16	8	69 *27.0%*
1st Cir.	1,664	101	197	36	16	350 *21.0%*
2d Cir.	3,365	250	629	188	73	1,140 *33.9%*
3d Cir.	2,199	178	376	75	44	673 *30.6%*
4th Cir.	4,951	132	312	110	45	599 *12.1%*
5th Cir.	12,013	428	661	93	193	1,375 *10.6%*
6th Cir.	3,751	110	529	107	80	826 *22.0%*
7th Cir.	2,336	84	366	79	72	600 *25.7%*
8th Cir.	4,137	170	396	82	47	694 *16.8%*
9th Cir.	7,665	397	912	208	214	1,731 *22.6%*
10th Cir.	4,100	211	400	74	50	735 *17.9%*
11th Cir.	5,569	116	643	88	56	903 *16.2%*
All Circuits	51,997	2,081	5,448	1,156	808	9,493 *18.3%*

Source: U.S. Sentencing Commission, *Final Year Quarterly Data Report, Fiscal Year 2007* (Mar. 19, 2008), Table 2, *available at* http://www.ussc.gov/sc_cases/ Quarter_Report_ Final_07.pdf.

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* Total Sentences excludes government-sponsored below-range sentences. *See Final Year Quarterly Data Report*, Table 2 n.6. Percentages are based on this total.

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